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IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1964

No.

JAMES R. BULLOCK

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals of Virginia has been reported in the advance sheets as *Bullock* v. *Commonwealth*, 205 Va. 867. A copy of said opinion appears in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Appeals of the Commonwealth of Virginia was entered on March 8, 1965; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

Whether the protection guaranteed an accused pursuant to the Fifth Amendment of the Constitution of the United States was violated and therefore constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, wherein he is forced to stand trial over his objection based on a plea of former jeopardy, while a petition for a Writ of Error is pending and undecided in the Supreme Court of the State, of the first judgment of conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation.

Fourteenth Amendment, Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the September 1963 Term of the Grand Jurors of the Commonwealth of Virginia, in and for the City of Norfolk, two indictments were returned against the petitioner herein; the second count of the first indictment being as follows:

"That the said James R. Bullock. alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of to-wit, $1596.00, No. 12217, dated 1-30-1962, payable to the order of The Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers thereof on the face thereof, which said purported

signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias James Reginald Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as makers thereof, to be in fact forgeries, and with intent then and there unlawfully and feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia."

The second indictment charged as follows:

"That James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the said City of Norfolk, to-wit $1,596.00 of United States currency of the value of, to-wit $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia."

Upon the first indictment so found, the petitioner was tried in Corporation Court, Part Two of the City of Norfolk, Virginia and at the conclusion of the trial, upon his plea of not guilty, the jury returned a verdict of guilty and imposed a sentence of twelve months in jail upon each count of the indictment.

Subsequently, the petitioner was granted a Writ of Error and Supersedeas by the Supreme Court of Appeals of the State of Virginia on the 23rd day of April, 1964.

Prior to the scheduled date of trial upon the second indictment, the Commonwealth's Attorney, pursuant to a

request of counsel for the petitioner, stated in writing that he would rely upon Section 18.1-118 of the 1950 Code of Virginia, as amended, in asking for a conviction on the aforesaid indictment (App. 4a).

At the date of trial of petitioner, upon the second indictment on the 14th day of January, 1964, prior to the impaneling of the jury, petitioner filed a written plea of Autrefois Convict (App. 4a), wherein he set forth that the conviction on the second count of the first indictment was a bar to his prosecution on the second indictment, and alleged that the indictment then pending was for the same offense as set forth in the second count of the first indictment, in that the evidence necessary to support a conviction on the then pending indictment, was the same evidence relied on to support a conviction on the second count of the first indictment; and in support thereof he averred that the date set forth in both indictments was identical, that the amount of money was identical in both indictments, and that the person or firm alleged to be defrauded in the present indictment, was the same person or firm brought forth by the evidence in the previous trial as being the person or firm to whom the forged promissory note was allegedly uttered, and from whom the money mentioned, the sum of $1,596.00, was obtained.

During the course of the argument on the petitioner's plea of Autrefois Convict the following soliloquy took place between Court and counsel (R 8-12):

Mr. Reid: If your Honor please, at this time I would like to submit a plea of former conviction.

The Court: All right, sir. Mark it filed.

Let the record show that the Defendant is present with Counsel, and that this hearing is not in the presence of any of the prospective jurors.

I see in paragraph 4 that the Commonwealth will rely on Section 18.1-118 of the 1950 Code of Virginia, as amended, paragraph 4 stated that the Commonwealth Attorney will rely on the 118 Code of Virginia.

Have you filed it in writing:

Mr. Whitehurst: No, sir. I will ask leave to file it as Mr. Reid mentioned.

The Court: When was the request made?

Mr. Reid: Request was made yesterday.

The Court: You will file that, Mr, Whitehurst; and that is the section you are relying on?

Mr. Whitehurst: 18.1-118.

The Court: This Exhibit A here you filed is a copy of the indictment on which the Defendant has been convicted?

Mr. Reid: Yes, sir.

The Court: Under this indictment, the first count, the forgery, and the second, the uttering?

Mr. Reid: Yes, sir.

The Court: And your contention is that the Defendant, having been convicted under this indictment and more especially the second count of uttering, that the Defendant cannot now be tried for grand larceny of the amount alleged in this indictment, is that right?

Mr. Reid: Yes, sir.

The Court: I have read it and I understand the plea. I think I understand your position. Have you anything further you wish to offer?

Mr. Reid: Except by way of argument, Your Honor.

The Court: All right, sir.

Mr. Reid: If Your Honor please, under the old section 18-233—

The Court: 18-233?

Mr. Reid: It's been deleted under the new code section of 1960, and appears under section 19.1-259.

The Court: That is offenses against two or more statutes or ordinances?

Mr. Reid: Yes, sir.

If your Honor please, as set forth in the annotations, the section was originally enacted to relieve the hardship that was established by the opinion of the Court in the case of Arrington versus the Commonwealth.

In that particular case—

The Court: What is that citation?

Mr. Reid: 84 VA 96, 12 SE 224.

In that particular instance—

The Court: That is in the footnote you are referring to?

Mr. Reid: Yes, sir.

The Court: What is the section?

Mr. Reid: 19.1-259.

The Court: Go ahead.

Mr. Reid: In that particular instance, the accused was on trial for the sale of liquor without a license. At that trial, he filed a plea of former jeopardy on the basis that on facts arising out of the same offense, he has been convicted of the sale of whiskey, liquor on Sunday. The Court said that they were two separate and distinct offenses. That had been the law up until the enactment of this particular section, which in the old code was 19-232.

At the present time, it is designated 19.1-259.

We still have, of course, the situation where one act can in fact constitute two separate crimes.

If that be true, then pleading acquittal of a former conviction of one would not necessitate the fact that he would have to be acquitted of the other, which is in a situation of driving under the influence and reckless driving.

For there, of course, a man can be driving under the influence without necessarily driving recklessly, but here, we have one situation.

The accused has been convicted under the second count of the first indictment of uttering a deed of trust note or promissory note, I believe is the way it is described in the indictment. The date set forth in that is the same date that is set forth in the present indictment which alleges larceny. The amount of money set forth is the same amount of money. The person named in both indictments or the firm or banking establishment named is the Seaboard Citizens National Bank of Norfolk. The present indictment alleges that that was the banking institution from whom the funds were supposedly procured by fraud and deceit; and in this particular instance, referring to Michie's Jurisprudence, Section 16, which sets forth the general rule states as follows:

> "It is stated that the test is whether the evidence necessary to support the second indictment would have been sufficient to produce a legal conviction upon the first."

In applying that as it is to the present situation at hand, the evidence pursuant to the section Mr. Whitehurst stated he was relying on, he must first show there was fraud. The only fraud he can show is that the signatures on this note were forgeries.

Secondly, he will have to show that the note was negotiated. Thirdly, he received the funds. The evidence in the first case was exactly the same thing, that the note was a forgery, that it was uttered at the bank, and the evidence in the first trial conclusively shows that the inducement from the Commonwealth's Attorneys, adduced from the witnesses that the money was paid, so consequently at this trial of this, the only way he can produce evidence sufficient to convict would necessarily have to follow that it would also sustain a conviction of uttering, the same instance of which he has already been convicted.

Quoting further, it says: "If the fact it will convict on the second prosecution will not necessarily have convicted on the first, the first will not necessarily be a bar," but the situation we have here is that the facts that convicted would also have to be sufficient to convict on uttering in the same instance.

The man has been put in jeopardy for this, and has been found guilty by the jury. That being so, we submit to the Court that it is double jeopardy to have him go to the trial for the same act at this time.

The Court: You don't have to have a larceny, though, to have the elements of uttering, do you?

Mr. Reid: No, sir, but that is not the rule.

The Court: You don't have to have the elements of uttering to prove a larceny?

Mr. Reid: You do not, however, here we are talking about this one act. That is what this former jeopardy is aimed at, but what the rule says is the fact that if the evidence at the second trial arising out of this same act would be sufficient to procure a legal conviction upon the prior indictment, then it is former jeopardy.

The Court: All right, sir.

Mr. Reid: That was Henson versus the Commonwealth, 165 VA 829, 183 SE 438. Here again, it says, "See Commonwealth versus Davis," 17 VA Law Register 509, and it also sets forth the general rule that identical charge is established when it shows that the same proof will support both. "Short versus U.S." which was a Virginia decision, 91 Fed. 2d 614.

Citing further, Your Honor, from 15 Am. Jur., 53, Section 380, Criminal Law, on the question of former jeopardy, it cites the heading of the paragraph, states it necessitates that the second trial be for the same act and crime.

> "The common law rule of constitutional provision declaratory thereof against the second jeopardy apply only to the second presecution for the same act, apply only in law, in fact, in which the first prosecution was instituted."
>
> "This does not, however, mean former technical, absolute identity. Substantial identity is sufficient. The fact that some single element of the offense charged may have some single element of some other offense as to which the Defendant has previously been in jeopardy is not sufficient to support a former plea of jeopardy," which is quite true.
>
> "It must appear that the Defendant on the first charge could have been convicted upon the offense in the second, but the term second offense or same offense is meant not only the same offense in its entirety and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment."

In this situation, particularly, the ruling in Virginia as set forth in Michie's Jurisprudence, I suggest this situa-

tion falls completely into. The evidence that would have to be produced now as a matter of necessity would have to support a conviction on the uttering indictment.

The Court: All right, sir, you are through?

Mr. Reid: Yes. sir.

The Court: Mr. Reid, this does not give me much trouble, this section 19.1-259 applies only, I think, in situations of state statutes and municipal ordinances. I think that larceny is defined as a separate and distinct act from forgery or from uttering, and it would not be the same act or the same crime in law and in fact as the first trial.

There is no conceivable way that the Defendant could have been convicted of larceny on an indictment charging forgery and uttering. I hold that larceny is a separate and distinct offense, and that double jeopardy would not be involved in a trial of this second indictment since the first indictment merely contained counts of forgery and uttering, to which you except."

Subsequent to the Court's action in overruling petitioner's plea of Autrefois Convict, a jury was impaneled and at the conclusion of the evidence, and the overruling af petitioner's motions by the Trial Court the jury's verdict sentencing petitioner to three years in the state penitentiary was entered.

On petitioner's motion a stay of execution of the judgment was entered by the Trial Court, and subsequently, upon petitioner's petition to the Supreme Court of Appeals of Virginia, a Writ of Error and Supersedeas was awarded on the 11th day of June, 1964.

REASONS FOR GRANTING THE WRIT

The major subject of review by the Supreme Court of Appeals of Virginia in the case at bar was whether an accused could be convicted of uttering a forged instrument, and after such conviction be tried under an indictment for obtaining money by false pretenses, over his objection; where the same identical evidence that was necessary to support the first conviction would have to be introduced in order to support a conviction under the second indictment; and where the two indictments were carved out of one continuing and uninterrupted set of facts.

However, the situation became more complex when the first conviction, which was the subject of an undecided appeal at the time of the second trial, was reversed and remanded to the trial court on the basis of reversible error committed by the trial court relating to a prejudicial instruction; subsequent to the granting of a Writ of Error and Supersedeas after the second conviction.

It is well to note that the question of whether an undecided appeal can be successfully pleaded as a former jeopardy under the terms of the Fifth Amendment to the United States Constitution was not decided by the Supreme Court of Appeals of Virginia, nor was the subject even considered.

From the foregoing, petitioner's argument will be divided into two subjects, and submitted for the consideration of the Court in the order listed:

1. Whether, when the facts of the two indictments which are the subject of this petition are present, an accused can be convicted of uttering a forged instrument, and of receiving the funds represented thereby by false pre-

tenses, when the factual situation constitutes one continuous act; or conversely, does a prosecution under the first indictment constitute a jeopardy, and, as such, bar the subsequent prosecution of the second indictment?

2. Does a pending appeal from a prior conviction constitute such a final judgment to allow it to be successfully pleaded as a former jeopardy to a pending indictment, pursuant to the Fifth Amendment to the United States Constitution?

The basic facts relied on by the prosecution in both cases are quite simple, and for all intents and purposes, identical as to both the testimony and the witness; and are taken from the testimony of Detective E. W. White of the Norfolk, Virginia police force. The testimony of the witness at the first trial of the petitioner on October 16, 1963; *Bullock* v. *Commonwealth* 205 Va. 558, 138 S.E. 2d 261, (R(5876)19), was as follows:

By Mr. Whitehurst:

Q Detective White, what are your initials?

A E. W.

Q E. W. White. You are a detective in the Norfolk Police Division, assigned to the check squad; is that correct?

A That's correct.

Q Detective White, in reference to this case, did you talk to the defendant, James R. Bullock?

A Yes, sir, I did, on August 6th, this year.

Q And were his statements in reference to these matters voluntary on his part?

A It was.

Q What was discussed and said about the transaction?

A We discussed the note—notes that are in evidence here and I inquired of him as to the signatures on the notes. He said the signature of "Bullock", which appears to the bottom of the names of the Bigellis, were his but the other two signatures were not his. He said he first saw these notes on his desk at his business over at the Heath Auto Sales which he operated.

Q Yes, sir.

A He said he negotiated the notes at the Seaboard Bank in Berkley.

Q Said he negotiated the notes himself?

A Yes, sir.

Q All right, sir.

A I asked him, did he receive the proceeds from the notes, and he said, yes, with some of it going into a reserve account that he had at the bank.

Q All right, sir, go ahead.

A He said that he knew, when he negotiated the notes, that they had not been signed by the Bigellis and he knew that they were phony, that the papers were phony.

Q Is that at the time of the negotiation of the notes?

A Yes, sir."

The testimony of the witness at the second trial of the petitioner on January 14, 1964; *Bullock* v. *Commonwealth*, 205 Va. 867, 140 S.E. 2d_____, (R(5938)24-25), was as follows:

Examined by Mr. Whitehurst:

"Q State your name, please. ...

A Detective E. W. White, with the Norfolk Police Department.

Q And your present assignment was?

A With the check squad, Detective Bureau.

Q You are in charge of the check squad?

A Yes, sir.

Q In reference to this particular case, did you have occasion to talk to the defendant?

A Yes, I did, on August 6, of 1963.

Q If you would start and relate what your conversation was, sir, and how it took place?

A Well, I first saw him at the Berkley Branch of the Seaboard Bank, approximately 11:00, 11:15, in the office of the Vice President of the bank, Mr. Koonce's office.

There was a discussion carried on between Mr. Koonce, the attorney for the bank, and Mr. Bullock in the presence of Detective Rawls and I, and also present were Mr. and Mrs. Bigelli.

The note was in question, bearing the signatures of the Bigellis and Mr. Bullock had offered to make payment by check, did write a check there for the balance owing on this note.

When asked about the signatures of the Bigellis there, he stated he did not write them, but he would be responsible for them.

From there we went to my office in the Police Headquarters Building, the Detective Bureau. There I talked to Mr. Bullock again. He stated that he owned and operated the Heath Auto Sales at 415 Campostella Road in the City of Norfolk, that the signature on this note which bore his name, that he signed.

* * *

A Yes, sir. He stated he signed his name to this note after the name of Daniel and Francis Bigelli, was

already signed to it, that he negotiated this note with the Seaboard Bank in the Berkley Branch, he received the proceeds, that he knew the note was phony° ° ° °."

ARGUMENT

1. Whether, when the facts of the two indictments which are the subject of this petition are present, an accused can be convicted of uttering a forged instrument, and of receiving the funds represented thereby by false pretenses, when the factual situation constitutes one continuous act; or conversely, does a prosecution under the first indictment constitute a jeopardy, and, as such, bar the subsequent prosecution of the second indictment?

In the decision presently complained of, the Supreme Court of Appeals of Virginia unqualifiedly held that the acts relating to the two indictments did not constitute the same offense, and in support of its contention stated that the matter had been decided in *Bateman v. Commonwealth*, 205 Va, 595, 139 S. E. 2d 102.

It is submitted that the decision in *Bateman* cannot be, when the facts of the case are considered, deemed analogous to the situation present in the case at bar. The Commonwealth in *Bateman*, in what has become the common practice, included four counts in each indictment, at least two of which constituted identical offenses, and proceeded to present the evidence and allow the jury to fit the evidence into the framework of the applicable counts presented. Bateman was tried, without objection, on eight indictments, each of which included four counts, ie, forgery, uttering, larceny of the amount of the check involved from the maker of the check, (In this instance the checks were signed by the maker, however, they were

altered before presentment and payment.), and larceny of the amount of the check from the banking institution to which they were presented for payment. The defendant was found guilty under three counts of two of the indictments, ie, forgery uttering and larceny (pursuant to Section 18.1-118 of the 1950 Code of Virginia, as amended, App. 4a) from the maker of the check, *and not from the person to whom the instrument was uttered.*

At the second trial of the petitioner, he offered a special plea of former jeopardy based on a prior trial and conviction for uttering a supposedly forged instrument. He then contended that he was being brought to trial on an indictment charging him with receiving the money represented thereby by false pretenses from the same person or firm to whom the instrument was supposedly uttered, and all of which, pursuant to the evidence in both cases, took place at the same time. He further contended that even if the evidence was sufficient to support a conviction in either case, both instances occurred out of one and the same set of facts. This situation was not before the trial court for direct ruling in *Bateman,* nor was it considered by the Supreme Court of Appeals of Virginia in that decision.

The complexity of this situation is cogently set forth in *Lawrence* v. *Commonwealth,* 181 Va. 582, 26 S.E. 2d 54, wherein the Court stated as follows:

> "Courts are in hopeless conflict when it comes to the solution of the problem of the identity of offenses. *State* v. *Fredlund,* 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 220. And cases dealing with that subject are almost unnumbered."

The decision of the Supreme Court of Appeals of Virginia is completely adverse to the applicable Virginia rule

wherein a plea of Autrefois Convict is concerned, and which follows a decided majority rule, as set forth in *Henson* v. *Commonwealth,* 165 Va. 829, 183 S.E. 438, p. 439, wherein 8 R.C.L., page 143, is quoted with approval as follows:

> "The prohibition of the ancient principal of the common law and the constitutional provisions declaratory thereof, against the second jeopardy, apply only to a second prosecution for the identical act and crime both in law and fact for which the first prosecution was insituted. In determining whether both indictments charge the same offense, the test is generally applied that when the fact necessary to convict on the second prosecution would necessarily have convicted on first, the final judgment on the first prosecution will be a bar to the second, but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed by the same state of facts. Stated in another form, if there was one act, one intent and one volition, and the defendant has been tried on the charge based on such act, intent and volition, no subsequent charge can be based thereon, though the crimes involved in the two proceedings are entirely different."

This rule is approvingly cited in 15 *Am. Jur., Criminal Law,* Section 380, page 56. See also *Short* v. *United States* (Va.) 91 F. 2d, 614.

A similar, if not identical, ruling is set forth in 16 *Federal Practice Digest, Criminal Law,* 196, page 318, citing *United States* v. *McGee,* 117 F. Supp. 27, as follows:

> "If evidence which is necessary to support second indictment is admissable under first indictment, and is related to same crime, and is sufficient if believed by

jury to have warranted conviction of first crime, offenses charged in first and second indictment are identical, and plea of former conviction or acquittal is bar to prosecution under second indictment, but if facts which will convict on second prosecution would not necessarily have convicted on first, the first prosecution will not bar second, although offenses charged may have been committed in same transaction."

The Supreme Court of Appeals of Virginia, in effect, also ruled that the two offenses herein complained of were not carved out of one set of facts, and did not constitute a continuing crime; where it ruled that petitioner's plea, pursuant to Section 19.1-259 of the 1950 Code of Virginia, as amended, (App. 8a), was not validly made.

In this instance the Supreme Court of Appeals of Virginia held that the evidence necessary to support a conviction for uttering a forged instrument, would not be the same as the evidence necessary to support a conviction for larceny. Conceding for the sake of argument that this is true, it has no bearing whatsoever on the issue as presented to the Court. Upon the second indictment the Commonwealth elected to proceed under Code Section 18.1-118 (App. 4a), which is not, by any stretch of the imagination, a codification of the common law crime of larceny.

Here there were two statutes involved; Section 18.1-96, Forgery and Uttering, and Section 18.1-118, Obtaining Money by False Pretenses. The acts which were necessary to accomplish the end which the Commonwealth offered evidence in an attempt to establish, are the same in both instances, which would violate both of the foregoing statutes; and the plea of a conviction of the first is a bar to a prosecution for the latter. Secondly, the rule of distinction between the supposed offenses, as arrived at by the trial

court, is equally erroneous. The Commonwealth elected to seek a conviction pursuant to Section 18.1-118 which is the specific crime of obtaining money by false pretenses, and not common law larceny; the statute states, " * * * he shall be deemed guilty of the larceny thereof; * * *"; it merely makes obtaining money by false pretenses equivalent to larceny, and sets forth what is necessary to constitute the offense.

It is earnestly submitted that the present trend is to circumvent by any devious means or play of words, through the never ending attempts on the part of the courts to effectuate rules upon which they can state that the plain and unconfusing language of the Fifth Amendment, to the United States Constitution, which is prohibitively cast upon the states by the Fourteenth Amendment, is not applicable to a given set of circumstances; in order to prevent any individual from effectively utilizing what is rightfully declared his. This problem has long been recognized by this Court, as appears from the decision in *Short* v. *United States, supra;* where the Court quoted from the opinion in *Murphy* v. *United States,* 285 F. 801, where the defendant was under a conspiracy to hold up and rob a United States Mail truck, and to conceal the stolen property taken therefrom, and where two separate, substitive offenses were created by statute; as follows:

> "The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demands a test which is practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine the issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution."

In an untiring and never ending attempt to codify every conceivable crime, the legislators, both federal and state, have enacted statutory crimes which can virtually be applied to any given set of circumstances; and in so doing, have forced persons accused of crime to beg protection to be relieved of the necessity of submitting to trial after trial for the same act, through the Fifth Amendment to the Constitution.

In *Munson* v. *McClaughry* (8th Circuit) 198 F. 72, 76, 42 L.R.A., N.S., 302, the defendant had been convicted on two counts; one for burglary of a post office with intent to commit larceny, and the second for larceny committed therein at the same time. After serving the sentence imposed on the first, after which the second was to commence, upon his application for release on habeas corpus, it was held that the sentence to separate punishment for larceny was void, and that he was entitled to release. Quoting from the opinion:

> "The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny at the same time and as a part of the same transaction may not be lawfully punished as separate offenses, because they are parts of a single continuous act inspired by a single criminal intent. * * *
>
> The United States Circuit Court of Appeals for the Ninth Circuit, after a thoughtful review of the authorities, has decided that, where one is indicted in separate counts and convicted of burglary of a post office with intent to commit larceny under Section 5478 (18 U. S. C. A. Section 2115), and of larceny at the same time as a part of the same transaction under section 5456 or 5475 (18 U. S. C. A. Sections 2112, 1707), he can be lawfully punished for the burglary only. Halligan v. Wayne, 179 F. 112, 102 C. C. A. 410.

> And because in such a case the burglary and larceny are parts of a single continuous act, inspired by the same single criminal intent, provable by the same evidence, because the arbitrary subdivision of such a single criminal act, inspired by the same criminal intent, into numerous offenses, is unauthorized and oppressive, because, after conviction of such a burglary, the subsequent trial for such a larceny in reality puts the defendant twice in jeopardy for the same criminal act and intent, and because this decision of the court of the Ninth Circuit is sustained by the eminent authority of its judgment and by the stronger and better reasons, its conclusion is followed and adopted by this court."

The *Munson* case was followed by *Stevens* v. *McClaughry*, 207 F. 18, 30 51 L.R.A., N.S., 390, wherein the Court held that a sentence was void as to its excess above the maximum that could be imposed for a single offense, where the defendant had been convicted under a two count indictment charging larceny of a mail pouch, and larceny of four registered letters containing money, and embezzlement of their contents. The Court, citing *Munson* v. *McClaughry*, *supra*, and the cases therein cited, stated:

> "The principal upon which the decisions in these cases rests, is that two or more separate offenses which are committed at the same time and are parts of a single continuing criminal act inspired by the same criminal intent which is essential to each offense, are susceptible to but one punishment."

In *State* v. *Hollman* (Supreme Court of South Carolina), 102 S.E. 2d, 873, where the defendant was convicted of resisting an officer and of assault and battery of a high and aggravated nature, the Court reviewed the cases last cited in holding that the conclusion was inevitable that the

assault on the officer was the essence of, and inseparable from, defendant's resist of arrest, and that the offense was essentially and substantially a singular one, and the defendant could not be convicted of both offenses and punished for each separately. The Court in reviewing additional cases, both federal and state, on this same question, stated on page 883:

> "It is oversimplification to say that 'the test of identity of offenses is whether the same evidence is required to sustain them'. That test is, as was said in *State* v. *Switzer, supra,* useful and generally adequate. But it must be reasonably applied; inflexible literality in its interpretation can lead to absurdity. For example, in *State* v. *Switzer, supra,* (65 S.C. 187, 43 S.E. 514), evidence that the storehouse was "within the curtilage" was not required to sustain a conviction under the second indictment;[1] in *State v. Dewees, supra*[2], evidence of the amount of money embezzled, and of the date of the offense, varied under the two indictments; and in *State* v. *Mitchell, supra*[3], evidence of breaking as well as entering was required under the first indictment, but not under the second; yet in each of those cases the prosecution under the second indictment was held double jeopardy.
>
> The test above stated must, too, be considered in the light of the settled rule of law, to which we have already referred, that where the offense is essentially and substantially a single one the state cannot divide it into two or more offenses and punish for it separately."

[1]Defendant was acquitted under an indictment charging attempted arson of a storehouse within the curtilage and subsequently indicted for an attempt to set fire at the same time, to the same building, which in the latter indictment was not alleged to have been in the curtilage.

[2]76 S.C. 72, 56 S.E. 674

[3]97 S.C. 474, 82 S.E. 676

On the question of carving out multiple offenses, the Supreme Court of Appeals of Virginia in *Campbell* v. *Commonwealth,* 201 Va. 507, followed the generally prevailing rule:

> "Where one act constitutes several crimes there may be a separate prosecution for each crime. But the state cannot split up a single crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime."[4]

In *Campbell* v. *Commonwealth, supra,* wherein Campbell was charged under two indictments; the first for felonious assault by striking an officer with a revolver, and the second for feloniously shooting the officer with the revolver; the facts revealed that the officer was struck, and some thirty seconds to a minute later, while still in a dazed condition, was shot by the accused. The Court in holding that a single crime was committed which could not be split and prosecuted into parts to convict of more than one offense, quoted *Rogers* v. *Commonwealth,* 257 Ky. 495, 497, 78 S.W. 2d, 340, as follows:

> "* * * But in administering, construing, and applying that maxim (nemo bis punitur pro eodem delicto) as it existed at common law and as inserted as a part of our Bill of Rights in our Constitution, it has long been judically declared that the prosecution may not split up a set of facts and carve out of them multiple offenses (statutory or otherwise) by founding or basing them on parts of an entire set of facts, and which parts are necessary ingredients and elements of the offense as embraced by the entire facts."

Considering the foregoing, which appears to be supported by the decided weight of authority, it is submitted

[4]Referring to *United States* v. *Buckner,* 37 F. 2d 378, 381.

that this same rule governs in this case; and that the Supreme Court of Appeals of Virginia denied the accused's constitutional guarantees in upholding the trial court's decision on his plea in bar, as provided by Section 19.1-259 of the 1950 Code of Virginia, as amended, (App 8a.)

2. Does a pending appeal from a prior conviction constitute such a final judgment to allow it to be successfully pleaded as a former jeopardy to a pending indictment, pursuant to the Fifth Amendment to the United States Constitution?

Petitioner was tried on one of three indictments returned at the September term 1963 in the City of Norfolk, Virginia, on the 16th day of October, 1963; the indictment consisting of two counts, one for forging a negotiable promissory note, and the other for uttering the same. Upon his petition to the Supreme Court of Appeals of Virginia a Writ of Error and Supersedeas was granted. Subsequently, on the 14th day of January, 1964, he was brought to trial, over his objection based upon his contention that the second count of the first indictment under which he was convicted, (uttering the negotiable promissory note), constituted both a prior jeopardy, and a trial and conviction pursuant to Section 19.1-259 of the 1950 Code of Virginia, as amended (App. 8a); contending that the same act constituted a violation of two statutes, while the first appeal was still pending and undetermined.

The Virginia appellant court in its final determination on petitioner's plea of former jeopardy, cited a case and authorities which support a decided majority view, wherein the application of the rule therein stated is applicable. However, neither the rule, nor the factual situation upon

which it is predicated, is applicable in the instance of the petitioner's case.

The general rule, supported by a decided majority, is to the effect that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy and may be tried again, where a verdict against him is set aside and a new trial granted on his motion in the trial court, or a conviction is reversed on appeal or error proceeding instituted by him. (15 *Am. Jur., Criminal Law,* Section 427, p. 89). The Supreme Court of Appeals of Virginia also cited *Cross* v. *Commonwealth,* 195 Va. 62, 63, 77 S.E. 2d 447, 448, wherein it is stated:

> "Where accused is convicted of offense and applies for and obtains new trial, he thereby waives his former jeopardy and subjects himself to further prosecution for the same offense, and therefore, where defendant successfully sought reversal of judgment of conviction, and appellant court remanded case for new trial if Commonwealth be so advised, defendant's plea of former jeopardy *on new trial* was without merit." (Emphasis added)

Although this rule is very well established[5], the basis for the application of the same was non-existent at the time of the second trial. As hereinabove stated, the question presented and argued was as to the effect of a then pending and undecided appeal at the time the petitioner was forced to stand trial under the second indictment; for at that time the decision had not been reversed and remanded for a new trial; nor was it reversed at the time of the granting of a Writ of Error and Supersedeas by that same Court upon conviction under the second indictment.

[5]See *Forman* v. *United States,* 361 U.S. 416, p. 425, 4 L. Ed. 412, 80 S. Ct. 481.

Regretfully, the authorities are not in complete accord on this question; and some decisions are contrary to what petitioner submits to be the only reasonable conclusion when viewed in light of the constitutional guarantee involved.

In 15 *Am. Jur., Criminal Law*, Section 376, p. 51, the following rule is stated:

> "Under a voidable judgment of conviction the defendant is in jeopardy, and such judgment is a bar to further prosecution on the same facts for the same or a higher offense necessarily including the former, until such judgment is reversed or set aside." (Citing *People* v. *Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 Am. St. Rep. 129.)

A view to the contrary has been taken by the Texas Supreme Court, as is shown by *Dupree* v. *State*, 56 Tex. Crim. Rep. 562, 120 S.W. 871, and is the subject of an annotation in 23 L.R.A. (N.S.) 596; wherein it is stated that where a conviction has been appealed from and the appeal is still pending, the defendant may be again tried for the same offense without violating his right as to jeopardy. The annotation of this matter is quite interesting and lends no support whatsoever to this position. It would first appear that there is a great question as to whether the second indictment in that case was in fact for the same offense, however, this becomes moot in light of the other cases cited. It is noted that *Dupree* was approvingly followed by *Harvey* v. *State*. 57 Tex. Crim. Rep. 5, 121 S.W. 501, wherein it was stated that there is ample authority for the position, however, there are no authorities given in that report. Secondly, the annotation indicates that there are but few authorities reported upon the question of the effect of the

defendant's taking an appeal from a conviction upon his right to plead the conviction as a bar to a second prosecution for the same offense, and these seem to be in direct conflict. Actually, there appears to be no other cases, at least from other jurisdictions, which expressly support this view.

In disposing of *Dupree,* it is well to note that the decision in *United States* v. *Olsen,* 57 F. 579, is directly in conflict with the Texas decisions cited above. In this case the Court, after quoting with approval a statement of Mr. Justice Clifford in *Coleman* v. *Tennessee,* 97 U.S. 509, 24 L. Ed. 1118, to the effect that a plea of former conviction is bad unless it contains the averment that the prior judgment is in full force and unreversed, said that it was not prepared to say that the defendant must also show that no appeal has been taken from the judgment pleaded at bar; and it was held that even though an appeal was pending, the defendant was not for that reason deprived of the protection of the judgment if it was otherwise sufficient. The Court also cited with approval *Bishop, Criminal Law,* Section 1021, to the effect that there can be no second prosecution while the judgment even if void is unreversed; not because there has been a jeopardy, but because an erroneous final judgment is voidable only, and of the same effect while it stands as a valid one.

A situation practically identical to that faced by the petitioner arose in *Bustamante* v. *People,* 136 Colo. 362, 317 P. 2d 885; where it was held that a defendant who has pending a writ of error based upon his conviction of embezzlement allegedly committed between certain dates may not, over his objections, be prosecuted for an alleged embezzlement on a date certain which is contained within the former period of time and which, in so far as the informa-

tions were concerned, involves the same office and funds. The Court further concluded that a conviction which is not yet final, due to its appeal, affords the defendant a shield against a second or later prosecution for the same offense pending determination of the appeal. Noting that after the commencement of the second trial, the first conviction was remanded for a new trial, the Court's ultimate conclusion was that under the circumstances stated above, a defendant is in double jeopardy where the prosecution, instead of awaiting the outcome of the first action, embarks upon a new, similar trial, while the former is still pending on appeal.

It is submitted that the petitioner's rights pursuant to the Fifth Amendment, which are brought to bear upon the individual states by the Fourteenth Amendment, were denied him, over his objection; and that there was no harmless error committed due to the fact that the first conviction was reversed and remanded. The guarantee afforded by the Fifth Amendment is unequivocably that he shall not be again placed in jeopardy; however, the decision of the Supreme Court of Appeals of Virginia here complained of is, in effect, when viewed in light of its opinion, a substitution of the jury's verdict in the second trial for the verdict that was reversed and remanded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

HERBERT S. REID, JR.
Counsel for Petitioner

Present: Eggleston, C.J., and Spratley, Buchanan, Snead, I'Anson and Carrico, JJ.

JAMES R. BULLOCK

-v-

COMMONWEALTH OF VIRGINIA

Record No. 5938

PER CURIAM

Richmond, Virginia, March 8, 1965

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK, PART TWO

Linwood B. Tabb, Judge

At the September, 1963, term of the court below James R. Bullock was indicted for the larceny of $1,596 from the Seaboard Citizens National Bank of Norfolk. Pursuant to Code (Repl. Vol. 1960), Section 18.1-109, the attorney for the Commonwealth filed a statement in writing that in asking for conviction he would rely on Code (Repl. Vol. 1960), Section 18.-118. This latter section provides that "If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *."

The defendant filed a plea of *autrefois convict*, alleging that on October 16, 1963, he had been convicted in the same court of uttering at the Seaboard Citizens National Bank on January 30, 1962, a forged promissory note in the sum of $1,596; that under the present indictment he is charged with obtaining from the same bank on the same date the same amount of money by means of the same forged promissory note involved in the previous trial; and that his prior conviction "constitutes former jeopardy for

the offense which he now stands indicted" and is a bar to the present prosecution.

In support of his plea the defendant offered the record in the former case showing his conviction of forging a note in the principal sum of $1,596, and uttering it by presenting it to the Seaboard Citizens National Bank on January 30, 1962.

In the trial on the special plea the lower court held that obtaining money by false pretense, which amounts to larceny under Code (Repl. Vol. 1960), Section 18.1-118, is a separate and distinct offense from uttering a forged note for that amount. Accordingly, it overruled the defendant's special plea. Upon being arraigned the defendant pleaded not guilty. There was a trial before a jury which found the defendant guilty, as charged in the indictment, and fixed his punishment at confinement in the penitentiary for three years. Judgment was entered on the verdict. We granted the defendant a writ of error.

The main contention of the defendant on this appeal is that the lower court erred in overruling his plea of *autrefois convict*. He argues here, as he did in the lower court, that uttering the forged note for $1,596 by presenting it to the bank constitutes the same offense as obtaining that amount of money from the bank by means of the forged instrument.

We agree with the lower court that these acts do not constitute the same offense, and we so held in *Bateman* v. *Commonwealth*, 205 Va. 595, 600, 139 S. E. 2d 102, 196, decided subsequent to the granting of the writ of error in the present case.

For the same reason there is no merit in the defendant's contention that the present prosecution is barred by

Code (Repl. Vol. 1960), Section 19.1-259. The pertinent portion of this statute reads: "If the *same act* be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution of proceeding under the other or others. * * *" (Emphasis added.)

Since, as we have said, uttering the forged note in violation of Code (Repl. Vol. 1960) Section 18.1-96, is not the "same act as obtaining money by means thereof in violation of Section 18.1-118, *supra*, the present proceeding is not barred by Section 19.1-259.

The defendant's plea of *autrefois convict* must fail for another reason. It appears from the records of this court, of which we will take judicial notice (*Cunningham* v. *Hayes*, 204 Va. 841, 857, 134 S. E. 2d 271, 275, and authorizes there cited), that the judgment of conviction of the defendant entered in the court below on October 16, 1963, and upon which he relies in his special plea, was on his petition for a writ of error reversed and the case remanded for a new trial by an order of this court entered on October 12, 1964. See *Bullock* v. *Commonwealth*, 205 Va. 558, 563, 138 S. E. 2d 261, 265. Hence the prior judgment of conviction, reversed at the instance of the defendant, cannot be pleaded in bar of the present proceeding. See *Cross* v. *Commonwealth*, 195 Va. 62, 63, 77 S. E. 2d 447, 448; 22 C.J.S., Criminal Law, Section 272-a, p. 700; Id., Section 273, p. 705; 15 Am. Jur., Criminal Law, Section 427, p. 89.

We find no error in the proceedings and the judgment is

Affirmed.

* * *

1950 CODE OF VIRGINIA

Section 18.1-118. *Obtaining money or signature, etc., by false pretense.* If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than two nor more than ten years. (Code 1950, Section 18-179; 1960, c. 358.)

• • •

PLEA OF AUTREFOIS CONVICT

TO: The Honorable Linwood B. Tabb, Judge of the Corporation Court of the City of Norfolk, Virginia,

Part Two

The accused, James R. Bullock, respectfully represents unto this Honorable Court as follows:

1. That he now stands indicted before this Court on the following indictment, to-wit:

"The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its September term, 1963, upon their oaths, present that James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the City of Norfolk, to-wit, $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take, and carry away,

against the peace and dignity of the Commonwealth of Virginia."

2. That he, the said James R. Bullock, was on the 16th day of October, 1963, tried before a jury duly impaneled before this Honorable Court on an indictment for the forgery and uttering of a certain deed of trust, note, or promissory note, a reasonable copy of the said indictment is attached hereto marked "Exhibit A" and is respectfully requested to be read as a part thereof. That at the conclusion of the said trial the jury found this defendant guilty of both counts contained in the said indictment and fixed his punishment at twelve months in jail on each of the said counts.

3. That upon the motion of this defendant, argued on the 22nd day of November, 1963, to set the jury's verdict aside as being contrary to the law and the evidence, final judgment, as aforesaid, was entered by this Court, however, upon motion of the defendant, a sixty day stay of execution was granted by the Court, to allow him to petition the Supreme Court of Appeals of the Commonwealth of Virginia, for a writ of error, and notice of appeal and assignment of error has theretofore been timely filed with the Clerk of this Honorable Court, with the requisite notice prescribed by statute.

4. That upon the request of this defendant, by counsel, the Attorney for the Commonwealth has advised that he will rely upon Section 18.1-118 of the 1950 Code of Virginia, as amended, in asking for conviction on the indictment presently pending before this Honorable Court.

5. That the said indictments presently pending before this Honorable Court is the same as the second count of the indictment tried before this Court on the 16th day of

October, 1963, in that the evidence necessary to support a conviction on the pending indictment is the same evidence relied on to support a conviction on the second count of the prior indictment. In support thereof he avers that the dates set forth in both indictments are identical, the amount of money is identical in both indictments, and the person or firm alleged to be defrauded in the present indictments is the same person or firm brought forth in the previous trial, as being the person or firm to whom the forged promissory note was uttered, and from whom the money mentioned, ie, the sum of $1,596.00, was obtained.

6. That the second count of the first indictment, and the present indictment do not set forth two separate and distinct crimes, but to the contrary, set forth the violation of two different statutes by the same act.

WHEREFORE, this defendant respectfully submits that his conviction of uttering under the second count of the first indictment on the 16th day of October, 1963, as is more fully disclosed by the record in the Clerk's Office of this Court, constitutes former jeopardy for the offense which he now stands indicted, under the present indictment, and he therefore moves that the same be relieved and discharged from any further proceedings under the said indictment.

JAMES R. BULLOCK, *by Counsel*

"EXHIBIT A"

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its September term, 1963, upon their oaths, present that James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962,

in the said City of Norfolk then and there unlawfully and feloniously did forge the names of Daniel Bigelli and Francis Bigelli, as makers of a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1,596.00 No. 12217, dated 1-30-1962, payable to the order of the Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Dainel Bigelli and Francis Bigelli, as makers thereof on the face thereof, to the prejudice of another's right, and with intent then and there unlawfully and feloniously to defraud against the peace and dignity of the Commonwealth of Virginia.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said James R. Bullock, alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1,596.00, No. 12217, dated 1-30-1962, payable to the order of the Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers, thereof on the face thereof, which said purported signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias, James Reginald Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon

to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as the makers thereof, to be in fact forgeries, and with intent then and there unlawfully ad feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia.

• • •

1950 CODE OF VIRGINIA

Section19.1-259. *Offense against two or more statutes or ordinances.* If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances *shall be a bar to a prosecution or proceeding under the other or others.* Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute. (Code 1950, Section 19-232; 1960, c. 366.) Emphasis added.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 227

JAMES R. BULLOCK,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Response to the Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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IN THE

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JAMES R. BULLOCK,

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COMMONWEALTH OF VIRGINIA,

Respondent.

Response to the Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

OPINION BELOW

The Decision of the Supreme Court of Appeals of Virginia has been reported in the advance sheets as *Bullock* v. *Commonwealth,* 205 Va. 867. A copy of said opinion appears in the Appendix to the brief filed by the petitioner.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fifth Amendment to the Constitution of the United States have been violated.

The respondent denies this.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land

or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." (Italics supplied)

QUESTION PRESENTED

Whether The Plea Of Former Jeopardy Is Good If Same Is Based On A Judgment Of Conviction Which Is Not Final And Conclusive And Not In Force At The Time Of The Second Trial, The Said Judgement Of Conviction Having Been Reversed By The Supreme Court Of The State On An Appeal Initiated By The Accused.

STATEMENT OF THE CASE

The petitioner, hereinafter sometimes called the defendant, was indicted at the September, 1963, term of the Corporation Court of the City of Norfolk, Part II, of uttering and attempting to employ as true a certain promissory note in the sum of $1596.00, dated 1-30-1962, well knowing that names purporting to be signed thereon as makers thereof to be forgeries, etc.[1] Another count of the same indictment charged petitioner with forging the said note. Upon this indictment he was found guilty of violating Section 18.1-96

[1] That the said James R. Bullock, alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1596.00, No. 12217, dated 1-30-1962, payable to the order of The Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers thereof on the face thereof, which said purported signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias James Reginald

of the Code of Virginia (1950) as amended.[2] Judgment was entered on November 22, 1963, by the trial court but it was suspended for a period of sixty days as the petitioner indicated he desired to appeal to the Supreme Court of Appeals of Virginia. On October 12, 1964, that Court reversed the judgment on account of the granting of an erroneous instruction, remanding same for a new trial. See, *Bullock* v. *Commonwealth,* 205 Va. 558, 138 S.E. (2d) 261. We are advised that this case has not been retried.

On January 14, 1964, the petitioner was placed on trial on the second indictment, charging him with larceny of the proceeds of the same note described in the first indictment, *supra.*[3]

On a demand of the petitioner made under Section 18.1-

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[2] If any person forge any writing, other than such as is mentioned in §§ 18.1-92 and 18.1-94, to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two years nor more than ten years, or, in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months. Any person who shall obtain, by any false pretense or token the signature of another person, to any such writing, with intent to defraud any other person, shall be deemed guilty of the forgery thereof, and shall be subject to like punishment. (Section 18-96, Code of Virginia.)

[3] That James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the said City of Norfolk, to-wit $1,596.00 of United States currency of the value of, to-wit $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as makers thereof, to be in fact forgeries, and with intent then and there unlawfully and feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia.

109 of the Code,[4] the Commonwealth's Attorney stated that he intended to prosecute under (rely on) Section 18.1-118 of the Code for conviction. Thereupon petitioner filed his plea of *autrefois convict,* a copy of which is filed on pages 4a, 5a and 6a of the Appendix filed with the petition.

The trial court, in overruling this motion, stated on page 12 of Record No. 5938 (Red leaflet):

> "The Court: Mr. Reid, this does not give me much trouble, this section 19.1-259 applies only, I think, in situations of state statutes and municipal ordinances.
>
> "I think that larceny is defined as a separate and distinct act from forgery or from uttering, and it would not be the same act or the same crime in law and in fact as the trial.
>
> "There is no conceivable way that the Defendant could have been convicted of larceny on an indictment charging forgery and uttering.
>
> "I hold that larceny is a separate and distinct offense, and that double jeopardy would not be involved in a trial of this second indictment since the first indictment merely contained counts of forgery and uttering, to which you except."

A conviction resulted. The petitioner was sentenced to three years in the penitentiary. The Supreme Court of Appeals of Virginia affirmed the judgment of the lower court by a *per curiam* opinion which is found on pages 1a, 2a and 3a of said Appendix.

ARGUMENT

The petitioner raises two questions in his argument:

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[4] * * * * On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth of what statute he intends to rely upon to ask for conviction. (Section 18-109, Code of Virginia.)

(1) Does a prosecution under the first indictment (uttering a forged instrument) constitute jeopardy and as such bar the subsequent prosecution of the second indictment (larceny)? (Brief and petition, p. 16)

(2) Does the appeal from a prior conviction constitute such a final judgment to allow it to be successfully plead as a former jeopardy to a pending indictment? (Brief and petition, p. 25)

We will answer these questions in the inverse order.

1. Plea Of Autrefois Convict Insufficient

Before this Court can properly consider the matter and argument set forth in the brief and petition filed in this case, pages 1 to 24, inclusive, there must be a showing that this plea is good. The plea is bad because on its face it shows that the judgment of conviction was not final. Even if we assume for the sake of argument that the two offenses were identical before the plea of autrefois convict charge would be good, the defendant (petitioner) would have to plead that the conviction was valid and final.

The Supreme Court of West Virginia was confronted with a similar situation in the case of *State* v. *Taylor* (1947), 130 W. Va. 74, 42 S.E. (2d) 549. The defendant contended that she had been convicted and sentenced by a justice of the peace for an offense which arose from the same set of facts which gave rise to the indictment. The warrant upon which she was convicted was vacated on appeal. The Court, in the course of its decision affirming the judgment of conviction, stated:

"These points, however, not being material to the issue of former jeopardy as raised in this case, need not

be discussed or determined. The plea of former conviction did not allege that the judgment was final and conclusive and the plea was, for that reason, insufficient. 15 Am. Jur., Criminal Law, Section 378. The action of the trial court in rejecting the plea was correct."

A person who has appealed a conviction waives his right to plead former jeopardy. *Cross* v. *Commonwealth*, 195 Va. 62, 77 S.E. (2d) 447. Furthermore, such a person's position is inconsistent for in one instance he contends that he has not been lawfully convicted and in the other contends that he has been convicted of the same offense, and therefore should not be retried for that offense. Thus, he should be estopped to plead the former conviction. The rule is set forth in 22 C.J.S., Criminal Law, Section 273, as follows:

"An accused obtaining reversal on appeal is estopped to plead prior conviction.

"An accused cannot benefit by the verdict of the jury if he chooses to appeal from it; hence, he is estopped to plead a prior conviction where his conviction has been reversed for error on an appeal or writ of error brought by himself; and this is so although accused at the time of the reversal has served a part of his sentence."

See also, 15 Am. Jur., Criminal Law, Section 427:

"It is generally conceded that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy and may be tried again where a verdict against him is set aside and a new trial granted on his motion in the trial court or a conviction is reversed on appeal or error proceedings instituted by him." (Citing the case of Stroud v. United States, 251 U.S. 15, 64 L. ed. 103, 40 S. Ct. 50, and many other cases decided by this Court.)

The second question raised by the petitioner (which we will answer first) is:

> "Does the appeal from a prior conviction constitute such a final judgment to allow it to be successfully plead as a former jeopardy to a pending indictment?"

Petitioner has cited the case of *Bustamante* v. *People*, 136 Col. 367, 317 P. (2d) 885, to substantiate his argument in this connection. In that case, the Court made this comment:

> "Under these facts the State should have awaited the outcome of the first action."

Apparently the Colorado criminal procedure differs from that in Virginia. As an indictment was pending against the petitioner, it was the duty of the State to have the second case tried forthwith lest the Commonwealth would be precluded from trying the case at all. Under the Virginia procedure such a criminal case must be tried within four regular terms of the Corporation Court after the accused is placed in custody, unless the same is continued on motion of the accused or some other circumstances arise. See, Section 19.1-191, Code of Virginia (1950) as amended. It usually takes about a year from the date of trial to process a case through the Supreme Court of Appeals. Hence, the Commonwealth could not have awaited the outcome of the first case before proceeding with the second unless the same had been continued on a motion of the petitioner. It was the petitioner who appealed from the judgment of the trial court and not the Commonwealth. He did not ask for a continuance. Furthermore, in the *Bustamante* case, the Court interpreted a section of the

Colorado Constitution which is not similar to the Virginia Constitution. We do not believe that this case is analogous to the case at bar. Neither is it controlling as it is contrary to the weight of authority.

Likewise, the case of *United States* v. *Olson*, 57 F. 579, which is also cited by petitioner, is not similar nor controlling. The Court held that the judgment of forfeiture was not a bar to the defendant's prosecution for the criminal offense in the indictment. The statement in the opinion relied upon by petitioner is mere *dictum* and apparently contrary to the general ruling so ably expressed by Mr. Justice Clifford in the case of *Coleman* v. *Tennessee*, 97 U.S. 509, 24 L. Ed. 1118, to the effect that a plea of former conviction is bad unless it contains the averment that the prior judgment is in full force and effect and unreversed.

In the *Coleman* case, this Court did not reach the question of whether the plea of *autrefois convict* was valid. It held that such a plea could not be maintained as it would have been an admission that the State Court had jurisdiction to determine the case on the merits. This Court simply held that the State of Tennessee had no jurisdiction to try the accused as the crime was committeed by a federal soldier during the time of the war while the State was one of the insurgent States. The accused had been tried and convicted for the same crime (murder) by a court martial and sentenced to death. The Court, although it ordered the accused released from State custody, directed that he be delivered to the military authorities of the United States to be dealt with as required by law. Mr. Justice Clifford dissented, believing that the judgment of the court martial not having been approved by the President, the same had become inoperative before the plea at bar was filed and was not such a judgment as would support a plea of *autrefois convict*. During the course of his opinion, he discussed the

law on the question of when such a plea was valid. We quote from his opinion:

> "Exceptions of the kind and many others existing to the rule that a former conviction for the same offense is a bar to a pending indictment, show the necessity that the plea should set forth the substance of the proceedings in the former suit, and contain sufficient averments to show that the judgment is unreversed and in full force and effect. Where the judgment in the former suit was in another jurisdiction, the form given for the plea of *autrefois convict,* as given in all the standard writers on the subject, contains the formal averment that the judgment is unreversed and in full force.
>
> * * *
>
> "Speaking of the plea of *autrefois convict.* Chitty says, it is of a mixed nature, and consists partly of matter of record and partly of matter of fact, and he adds, with emphasis, that it is settled to be absolutely requisite to set forth in the plea the record of the former acquittal; and, if so, it is equally requisite that it should be averred that the judgment is unreversed and in full force, as every lawyer of experience in criminal law knows, that, if the verdict was set aside or the judgment arrested at the request of the person convicted, the conviction becomes a nullity. 1 Chitty, Cr. L. 463; *Regina* v. *Drury,* 3 Car. & Kir. 193; *Waller* v. *The State,* 40 Ala. 325."

The doctrine expressed by this learned judge is as sound today as it was in 1878. Clearly, the plea of the petitioner in the case at bar was defective not only in form but in substance. The judgment which he sought to put up as a bar to the second prosecution was reversed on appeal and thereby became a nullity. Furthermore, the judgment was not *in full force* and effect when he entered his plea as it had been suspended on his motion so he could petition the Supreme Court of Appeals of Virginia for relief.

In 61 A.L.R. (2d) 1224, there is an annotation of the cases on this subject. According to this work in the following jurisdictions, the rule prevails that while an appeal from a judgment of conviction is pending, the judgment does not support a plea of former conviction in a subsequent prosecution for the same offense:

Massachusetts—*Commonwealth* v. *Fraher*, 126 Mass. 265.

Oklahoma—*Fay* v. *State*, 62 Okla. Crim. 350, 71 P. (2d) 768.

Texas—*Dupree* v. *State*, 56 Tex. Crim. 387, 120 S.W. 875 and other cases. *Dailey* v. *State*, 162 Tex. Crim. 387, 285 S.W. (20) 733.

West Virginia—*State* v. *Taylor*, 130 W. Va. 74, 42 S.E. (2d) 549.

The reasoning of the Texas Court in the *Dupree* case, ***supra***, is worthy of consideration. We quote from the decision in that case:

> "It would, indeed, be a singular doctrine to hold that because in one case, in prosecutions covering many months, a conviction for violating the local option law had been had, while contesting this conviction and resorting to all the means known to law to escape its result, the appellant would be able to use such conviction, while still denying its force and while suspending its effect, as a shield against prosecution for other sales. If this could be done, it might easily happen that, while contesting the first 13 cases, an acquittal might be obtained in the remaining 12 cases on the ground of former conviction, and finally on appeal a reversal obtained in the first case, and ultimately a judgment of acquittal therein secured. It would thus happen that appellant would secure the benefit of a former conviction in the 12 cases, whereas it might result that in the case used as a shield he would go free, and we would

> have the strange anomaly of 12 acquittals by reason of a former conviction, when finally it should be determined that the appellant was not guilty at all, and he would escape punishment in all 13 cases, in some or all of which he might be guilty, on the ground of a conviction in the trial court, contested by him, in which it had been finally determined that in fact he was not guilty of any offense." (120 SW 873)

Petitioner concedes that the general rule supported by a decided majority that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy when his conviction is reversed on appeal in a proceeding instituted by him. (Brief and Petition, p. 26) This being so, what possible difference would it make from a constitutional standpoint whether the reversal was before or after the plea was made so long as the reversal was ordered before a final judicial disposition of the second case is made. The first judgment of conviction against petitioner was reversed on October 12, 1964, long before the second judgment of conviction (as at bar) was affirmed by the Supreme Court of Appeals of Virginia. (March 8, 1965)

Petitioner also argues that the Supreme Court of Appeals of Virginia has erred in not granting his plea under Section 19.1-259, Code of Virginia.

Section 19.1-259 of the Code is as follows:

> "If the *same act* be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, *conviction* under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution

or proceeding under the State statute." (Italics supplied)

Conceding for the sake of argument that the offenses charged in the indictments of violating the two statutes in the first and second cases are identical, the provisions of this statute are not applicable. In order that the plea under this section be good, it must be shown that the accused has been finally convicted. The mere proceeding or prosecution which does not result in a conviction does not bar another prosecution in a State court. *Owens* v. *Commonwealth*, 129 Va. 757. When the plea was made in the lower court, the first case (tried on October 16, 1963) the judgment had not become final as the case had been appealed to this Court. That case was subsequently reversed. Hence, defendant does not stand convicted of the offense upon which he was tried on October 16, 1963 (first case).

Assuming that the two offenses upon which the petitioner was tried are identical (which we deny), we submit that the plea of *autrefois convict* fails because the judgment of conviction upon which the plea is based was reversed at the instance of the petitioner and cannot be plead in bar of the present proceeding.

2. Offenses Not Identical

Although we believe that the plea of *autrefois convict* should be rejected for the foregoing reasons and it is therefore unnecessary for the Court to consider the question of whether the offenses were identical, we will not let the argument made by the petitioner on this point go unchallenged. The interpretation placed on the Virginia statutes by the Virginia Supreme Court of Appeals should be accepted by this Honorable Court.

We will now answer the first question raised by petitioner, to-wit:

> "does a prosecution under the first indictment (uttering a forged instrument) constitute jeopardy and as such bar the subsequent prosecution of the second indictment (larceny)? (Petition, p. 16)

It should be borne in mind that the petitioner was charged with the violation of two separate and distinct statutes, to-wit, Section 18.1-96 (uttering a forged instrument) and Section 18.1-118 (larceny—obtaining money under false pretenses).

The rule is well established that prosecutions of a person for separate offenses based on the same transaction do not involve double jeopardy where there are distinct elements in one offense which are not included in the other. 15 Am. Jur., Criminal Law, Section 389. Furthermore, Section 392 of the same authority states:

> "A single act may be an offense against two statutes; and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and and punishment under the other."

This Court expressed this rule in the case of *Blockburger* v. *United States,* 284 U. S. 303, 304, 76 L. Ed. 369, in the following language:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is ***whether***

> *each provision requires proof of an additional fact which the other does not.*" (Italics supplied)

The Court, in the case of *Gore* v. *United States,* 357 U. S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280, in affirming the conviction of the accused for the violation of several statutes brought about by a single sale of narcotics, reaffirmed the doctrine laid down in the *Blockburger* case, *supra.* We quote from the opinion in that case (357 U. S. 391):

> "Finally, we have had pressed upon us that the Blockburger doctrine offends the constitutional prohibition against double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority."

There were two separate offenses committeed by the petitioner at the same time. One was uttering the forged note purporting to be signed by Bigelli and Mrs. Bigelli; the other was obtaining the proceeds of the note from the bank. The two offenses were so closely connected in point of time, it was impossible to separate the evidence relating to either. Being placed in jeopardy for one of these acts is not a bar to the prosecution of the other. The rule is well stated in 21 Am. Jur., 2 Criminal Law, Section 188:

> "The fact that one has been in jeopardy for one act is no bar to a prosecution for a separate and distinct act, though the other act is so closely connected in point of time that it is impossible to separate the evidence relating to either on the first trial. This is the situation where two distinct crimes are committed in one transaction. Further, prosecutions for separate offenses

> based on the same transaction do not involve double jeopardy where there are distinct elements in one offense that are not included in the other. In some jurisdictions, however, multiple prosecutions are not permitted, where, an assault upon, or the murder of, two or more persons is committed by one and the same act, as, for example, by the single discharge of a firearm or by one stroke of a knife or other similar weapon."

Likewise, in the case of *Morgan* v. *Devine,* 237 U. S. 624, 629, 59 L. Ed. 1153, this Court stated:

> "The principle stated by the supreme judicial court of Massachusetts, in Morey v. Com., 108 Mass. 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact which the other did not, and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute."

When the petitioner was tried on the "uttering indictment" in October, 1963, it was not necessary for the evidence to show that he had obtained money from the Seaboard Citizens National Bank of Norfolk. All that was required was the showing that petitioner had uttered the forged note.

In the case of *Bateman* v. *Commonwealth,* 205 Va. 595, 600, the Court stated:

> "The word 'utter' is defined in Black's Law Dictionary, 4th ed., page 1716, as meaning 'To put or send [as a forged check] into circulation. * * * to utter and

publish.' It is an assertion by word or action that a writing known to be forged is good and valid.

"May one be found guilty of forgery and of uttering the forged check and of the larceny of the proceeds of the check? The answer is 'Yes,' if the evidence sustains each charge.

"The evidence necessary to establish forgery or uttering a forged instrument is not the same required to establish larceny. One may attempt to employ as true a forged instrument, yet not be guilty of larceny if he obtained no money or property by his action.

" 'A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute, * * *.' *Hundley* v. *Commonwealth*, 193 Va. 449, 451, 69 S. E. 2d 336.

"Section 18.1-118, Code of 1950, provides:

" 'If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *.'

"It is well settled in this jurisdiction that proof that the accused obtained money by false pretenses will sustain an indictment for larceny. *Lewis* v. *Commonwealth*, 120 Va. 875, 91 S. E. 174."

In the prosecution of the petitioner under the indictment charging him with larceny—stealing money from the said bank—it was necessary for the evidence to show that he actually obtained money from this bank. Hence, the same evidence was not required to sustain these separate and distinct offenses. The uttering of the forged instrument (note) had been completed before the petitioner obtained the money from the bank. The acts constituting the second offense (larceny) did not really commence until

after the forged note had been uttered. The two offenses did not constitute a continuing crime as argued by the petitioner. After the bank had acted and placed the proceeds of the note to the credit of petitioner's company and at petitioner's disposal, had petitioner been an honest person or had he reflected (after committing the uttering) he could have refrained from using the said proceeds. He did not do this, however, but proceeded to use (obtain) the money so credited to his account. As a matter of fact, as shown by the evidence in the case at bar, petitioner had negotiated at least three other forged notes at the same bank about the same time. Such evidence of similar offenses was clearly admissible as tending to show a general scheme or guilty knowledge and fraudulent intent on the part of petitioner.

Petitioner cites the case of *Henson* v. *Commonwealth,* 165 Va. 829, where the Court quoted language from 8 R.C.L. and so petitioner states that the decision in the case at bar of the Supreme Court of Appeals "is completely adverse to the applicable Virginia rule wherein a plea of *autrefois convict* is concerned."

The author of that work (8 R.C.L.) is careful to point out that "the *final* judgment on the first prosecution will be a bar to the second." Hence, this would not be applicable in the case at bar as there was no final judgment on the first prosecution.

In the *Henson* case, the defendant was on trial for the violation of a statutory offense; that is, failing to stop immediately at the scene of an accident in violation of Code Section 2154 (104) Michie's Supp. 1932. The defendant had already previously been convicted of manslaughter (resulting from the same accident). Manslaughter is not defined by statute in Virginia, being a common law offense. Only the penalty is prescribed by statute. Hence, one offense in *Henson* was statutory and the other a crime at common law. In

the case at bar, both offenses are defined by the statute and are separate and distinct. These two offenses are not carved out of the same set of facts as argued by petitioner. The Court, in the *Henson* case, stated:

> "The accused filed two special pleas: One of former conviction and the other under section 4775* of the Code (as amended by Acts 1920, chapter 118), which provides in part: 'If the same act be a violation of two or more statutes, or of two or more municipal ordinances, conviction under one of such acts or ordinances shall be a bar to a prosecution or proceeding under the other or others.'
>
> * * *
>
> "It is urged with great force that the court should have sustained the two special pleas and that the Commonwealth should not be permitted to carve two separate and distinct offenses from the same continuing transaction."

We believe that where the offenses are defined by statute, the Virginia rule is that which is set forth in *Hundley* v. *Commonwealth,* 193 Va. 449, is controlling to determine whether the offenses are identical. See, *Bateman* v. *Commonwealth, supra.*

The petitioner lays great stress on the proposition that whereas the evidence of Detective White (narrating what petitioner had told him) was the same in both cases, and, therefore, his plea of former jeopardy should have been sustained. Of course, the evidence introduced in the first trial (not objected to by the petitioner) to the effect that the proceeds of the note were credited to the checking account of petitioner's company and under his control was not necessary to sustain the conviction of forgery and uttering of the forged note.

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* Now 19.1-259, Code of Virginia (1950) as amended.

The mere fact that the same acts were proven in both trials does not make the offenses identical. The rule is stated in 21 Am. Jur. (2d), Criminal Law, Section 182, as follows:

> ". . . that act, intent, and violation, no subsequent charge can be based thereon, but there is no identity of offenses if on the trial of one offense proof of some fact is required that is not necessary to be proved in the trial of the other, although some of the same acts may *necessarily* be proved in the *trial of each.*" (Citing *Ebeling* v. *Morgan,* 237 U.S. 625, 59 L. Ed. 1151, 35 S. Ct. 710.) (Italics supplied)

The same authority in Section 108 also stated:

> "The common-law rule and the constitutional provisions against a second jeopardy apply only to a second prosecution for the same act and crime both in law and fact on which the first prosecution was based." (Citing *United States* v. *Adams,* 281 U.S. 202, 74 L. Ed. 807, 52 S. Ct. 269.)

To be identical offenses the same must not only be identical in fact but also in law. *State* v. *Kingsbury* (Washington), 266 Pac. 174. In order to sustain a plea of former jeopardy, the offenses must be identical both in fact and in law. *State* v. *Elliott* (Washington), 124 Pac. 212. We quote from the decision in that case:

> "The information charges the defendant with the crime of forgery in the first degree, committed by uttering as true, to one George E. Johnson, on the 17th day of July, 1911, a certain forged policy of insurance with intent to defraud.
>
> * * *
>
> "The information in the first case, upon which the plea of a former conviction is predicated, charged the defendants with the crime of grand larceny, in that

they acquired the possession of a certain automobile by fraudulently and falsely representing to George E. Johnson that the true name of the defendant Joseph T. Dyer was John A. Arnold.

* * *

"From the facts stated it will be observed that in the first case the appellant was charged with the crime of obtaining goods by means of a false pretense; the pretense being that Dyer was Arnold. In the case at bar he is charged with knowledge uttering a forged instrument with intent to defraud. The evidence shows that the four papers, the mortgage, note, abstract, and policy, constituted, in fact, one security, and were uttered at the same time. Upon these facts, the appellant contends that the transacion was single and indivisible, and constituted only one crime.

* * *

"The first case rests primarily upon securing credit for a false name. This case rests upon knowingly uttering a false instrument with intent to defraud. There is not a complete identity of facts in the two cases. The element of a false name, the gist of the former offense, does not enter into this case. Moreover, this court is firmly committed to the view that, to sustain the plea of former jeopardy the offenses must be identical in both fact and law.

* * *

"The false name was of the essence of the first offense, and the uttering of the spurious security is of the essence of the second offense."

Considering the foregoing, it is manifest that the decision of the Supreme Court of Appeals is supported by the weight of authority (including cases decided by this Honorable Court) where acts committed in one transaction constitute offenses against two statutes necessitating proof of a different element from that which the other requires the conviction of one is not a bar from prosecution under the other.

CONCLUSION

It is submitted that the petitioner has not been denied any rights guaranteed him under the Fifth Amendment to the Constitution of the United States as he has not been placed in jeopardy twice for the same offense.

From the foregoing, it will be observed that there are no new questions raised by the petition for writ of certiorari. The legal principles have already been determined. Therefore, we maintain that the petition fails to present a substantial federal question.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to Herbert S. Reid, Jr., Esq., Suite 100, 2008 Atlantic Avenue, Virginia Beach, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 5th day of November, 1965.

D. GARDINER TYLER
Assistant Attorney General

Office-Supreme Court, U.S.
FILED
DEC 1 6 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1965

No. 227

JAMES R. BULLOCK,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Defendant

Petition for Re-hearing of Order denying Petition for Writ of Certiorari

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Virginia Beach, Va.
Counsel for Petitioner

THE RELIANCE PRESS OF NORFOLK, VA., INC.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

No. 227

JAMES R. BULLOCK,

Petitioner

vs.

COMMONWEALTH OF VIRGINIA,

Defendant

MOTION

Petitioner, James R. Bullock, respectfully moves this Honorable Court for leave to file the annexed petition for re-hearing of the order of this Court denying the petition for a writ of certiorari in this case, entered on November 22nd, 1965. Re-hearing is sought at this time by virtue of the fact, as is more fully set forth in the annexed petition, that the decision of this Court on June 22nd, 1964, in *Escobedo* v. *Illinois*, 378 U.S. 478, had not been established at the time that either of the two cases, which were the subject matter for the writ of certiorari, were filed in the Supreme Court of Appeals of the State of Virginia; and accordingly, provisions for that rule were not available to the petitioner at that time.

HERBERT S. REID, JR.
Counsel for Petitioner

December 14th, 1965

Petitioner, James R. Bullock, respectfully prays that this Honorable Court grant re-hearing of its Order of November 22, 1965, denying his petition for a writ of certiorari previously filed herein, and that a writ of certiorari be issued to review the judgment of the Supreme Court of Appeals of the State of Virginia in the above entitled cause, as prayed for in the Petition for a Writ of Certiorari filed herein.

REASONS FOR GRANTING RE-HEARING

1. There was not sufficient evidence presented by the Commonwealth of Virginia to establish the corpus delicti and to support a conviction of the petitioner, which in effect was tantamount to a denial of due process of law, as prescribed by the Fifth Amendment to the Constitution of the United States.

The evidence as to the corpus delicti in this situation is very slight, to say the least. The only evidence which could be considered as going directly to it would be the testimony of Detective E. W. White, wherein he stated that the defendant told him that he was the owner and operator of Heath Auto Sales, that he signed the note in question after the other signatures were already on it, negotiated it at the bank and received the proceeds therefrom, knowing at the time that the note was phony, (RT 60-61).

The presently accepted definition of the term corpus delicti was recently reiterated in *Lucas* vs. *Commonwealth*, 201 Va. 599, citing with approval the definition set forth in 5 *Mich. Jur.*, Criminal Procedure, Section 54, pp. 400, 401, as follows:

"The corpus delicti is the fact that the crime charged has been actually perpetrated. It is the body or substance of the crime. The corpus delicti consists not merely of an objective crime, but of the defendant's agency in the crime."

Stated in another form, it is said to consist of the proof that the act itself was done and that it was done by the person charged, and by none other—in other words, proof of the corpus delicti and of the identity of the prisoner. 20 *Am. Jur.*, Eivdence, Section 151, p. 155.

If we concede, for the purpose of argument, that the first part of the definition has been established; the agency of the defendant in the same is far from established. It is a long established rule that the extra judicial statement of the accused is not, standing alone, sufficient to establish the corpus delicti, *Cleek* v. *Commonwealth,* 165 Va. 697, 181 S.E. 359. However, it is also well established that the corpus delicti may be proved by circumstantial evidence which produces full assurance of moral certainty on the subject. *Cochran* v. *Commonwealth,* 122 Va. 801, 94 S.E. 329. The question of what circumstantial evidence is required, or the degree of proof necessary to be established by circumstantial evidence, is considered in *Campbell* v. *Commonwealth,* 194 Va. 825, 75 S.E. 2nd 468, wherein the court set forth:

"***a confession is competent evidence tending to prove the corpus delicti, and all that is required of the Commonwealth in such cases is that there be such substantial corroborative circumstances as will, when taken in connection with the confession, establish the corpus delicti beyond reasonable doubt. *Cochran* v. *Commonwealth,* 122 Va. 801, 817, 94 S.E. 329; *Cleek* v. *Commonwealth, supra,* 165 Va. at page 699, 181 S.E. at page 360; *State* v. *Blackwell,* 102 W. Va. 421, 135 S.E. 393, 394."

If we may concede, again for the purpose of argument, that the testimony of Detective White amounts to a "confession" of the accused, there still remain a number of facts which would have to be established in order to corroborate the "confession". With this in mind the first uncorroborated fact, or element, is whether the accused received the money. The Commonwealth's witness, John B. Gibson, Jr., who was an assistant cashier at the bank, stated that he handled the transaction, insofar as it concerned the bank (RT 23, 24, 25). However, he could not say who he dealt with regarding the note (RT 25), and the testimony of this witness, uncontradicted, is that the proceeds of the note were credited to a checking account in the name of Heath Auto Sales Company, Incorporated (RT 29). At no place in the testimony is there on scintilla of evidence to corroborate the testimony of Officer White, that the defendant received the proceeds of the note, or even that the defendant negotiated the note on behalf of the Corporation. With reference to any inference that might be drawn, or concluded, from the evidence that the defendant endorsed the paper, it is well to bear in mind that as a prerequisite of any loan made in the name of Heath Auto Sales Company, Incorporated, someone representing the dealer had to endorse the notes, (RT 34-37), and this was true in every instance, including those transactions that were brought to the bank by persons other than the defendant, and even in those that were picked up by the representative of the bank.

In viewing the facts of the case, and the law applicable to the subject, it is submitted that the corpus delicti was not proved beyond a reasonable doubt by the Commonwealth, and the action of the Supreme Court of Appeals of Virginia in its failure to so rule, constituted a denial to the

petitioner of the protection of the provisions of the Fifth Amendment to the Constitution of the United States.

2. Does the refusal on the part of police officers to allow the accused to talk and consult with his attorney, when he was being illegally held for the purpose of interrogation, during which period of time the supposed statements were made, which were the basis of the evidence used to support his conviction, violate the protective provisions of the Sixth Amendment to the Constitution of the United States, wherein he was denied the right of the assistance of counsel?

Inasmuch as both trials of the petitioner were related to the petition for certiorari previously filed herein, he begs leave of Court, insofar as this question is concerned, to make reference not only to Records Number 5938 and 5876, that being the designations of this matter in the Supreme Court of Appeals of Virginia, but also to the certified copy of the transcript of the testimony in the first trial and proceedings, and constituting a part of the record.

For the sake of clarification, it is here the contention of the petitioner that the rule as prescribed and laid down by this Court in Escobedo v. Illinois, 378 U.S. 478, decided June 22, 1964, was not available at the time that both of these matters were heard in the trial court.

The facts which are the basis of this question, which is here raised for the first time, for the reason hereinabove set forth, are as follows.

Petitioner was met by E. W. White and L. R. Rawls, two detectives of the Norfolk Police Department on the 6th day of August, 1963, at the Berkley Branch of the Seaboard Citizens National Bank, Norfolk, Virginia approximately 11:00 o'clock A.M. At this time a question had been

raised as to the validity of a certain chattel deed of trust and note, the note being the subject matter of the two cases complained of in the petition for a writ of certiorari previously filed herein, purportedly signed by Daniel J. Bigelli and Frances Bigelli, and endorsed by James R. Bullock, however, both of the Bigellis, who were present at this time, denied that the signatures were theirs.

At approximately twelve noon the accused was taken to police headquarters and detained by the detectives for some four hours. During this time it was admitted by Detective White that petitioner was there for the purpose of interrogation as is shown by the following* (RT 61-64):

"Q. Was Mr. Bullock free to leave any time he wanted to?

A. Up until a certain point, yes, sir.

Q. What time was this point reached, Mr. White?

A. Until the warrant was obtained for him, around three o'clock.

Q. Around three o'clock. I believe you stated previously it was around four.

A. I said he was put on the police docket at around four. The warrant was obtained for him approximately 3:00 p.m. After that, he was processed, photographed, fingerprints taken, and then was carried to the First Precinct where he was placed on the docket.

Q. Officer White, let me ask you this: At the time you left the bank, you had sufficient evidence—you had sufficient knowledge of this situation on which you could have obtained, as you did subsequently, a warrant upon information, did you not?

*The reference here, and throughout the remainder of this question, are to the transcript of the first trial.

A. I knew nothing about it until I got to the bank.

Q. I see. I'm talking about at the time you left the bank. You had sufficient knowledge at that time so that you could have obtained a warrant on information; is that not correct, sir?

A. I wouldn't say I had for sure, no.

Q. Well, what was your point in questioning, or wouldn't it be better to say, interrogating Mr. Bullock?

A. To determine if he knew who signed the names of Mr. and Mrs. Bigelli who had denied signing them, and to find out anything I could concerning it.

Q. In other words, your purpose in him being over there was to interrogate him, get admissions from him, as to his guilt or the guilt of others; is that correct sir?

A. It was to find out what transpired and who had negotiated this thing, this deal.

Q. Mr. White, you had people who said they didn't sign this paper?

A. Yes.

Q. Mr. Bullock's signature appeared on it?

A. Yes.

Q. Mr. Bullock appeared at the bank and said he would pay off the note because he was the endorser on it?

A. Right.

Q. Didn't you have enough information there to procure a warrant on information?

A. I wouldn't have thought so.

Q. Mr. White, the truth of the matter is that you didn't want to get a warrant because at that time he would have to be admitted to bail and that you wanted to talk to him, to interrogate him?

MR. WHITEHURST: Your Honor, I do not know what all these suppositions are that he's saying his man was guilty there at the bank and he shouldn't question him any more.

MR. REID: I am not saying any such thing.

THE COURT: Go ahead and ask the question.

THE WITNESS: Would you ask that again?

BY MR. REID:

Q. Wasn't it your intention and your purpose for not getting a warrant at that time—wasn't it for the purpose of interrogating the accused because you knew, if you got a warrant, that you knew he would have to be admitted to bail?

A. I was trying to determine if he was the guilty person before getting the warrant.

During the course of cross-examination Detective White admitted that he was aware that Attorney Herbert S. Reid, Jr. called and requested that he be allowed to speak with his client. (RT 66, 67). It is well to note that while the detective contended that petitioner was not in custody, Detective White's testimony was all together different (RT 69):

Q. You were with him—either you or Detective Rawls were with him the entire time, were you not, sir?

A. Yes. He was down the hall to the water fountain a time or two, but he was not out of our sight, I'll say that.

The other detective, L. R. Rawls, on this same subject, testified as follows (RT 134, 135):

Q. Now, what time in the—did you lock Mr. Bullock in a small room while he was at the Police Headquarters?

A. No, he was in the back room; no, sir.

Q. You don't recall locking him in a small room?

A. No, sir.

Q. Is there a small room up there that has a lock on it?

A. No, sir, all the locks are on the cells.

Q. Pardon?

A. All the locked places would be the cells.

Q. Is there any place in this particular portion of Police Headquarters where a prisoner could be secured for a period of time rather than taking him to jail?

A. Our cells, yes, sir.

Q. You have cells, there?

A. Yes, sir, we have cells on the second floor.

Q. Is this on the second floor where you are?

A. Yes, sir.

Q. Are they small cells?

A. That's right, yes, sir, individual cells.

Q. I see. And you don't recall Mr. Bullock being locked in one of these?

A. No, sir, not in a cell.

Q. Was he locked in a room of any kind?

A. He was in a back room, yes, sir, that has an outside lock to it.

Q. Was it locked?

A. Yes, sir.

The testimony of Detective L. R. Rawls goes more directly to the point of denying the petitioner the right to assistance of counsel, as appears from the following, (RT 130-133):

Q. Did there come a time on, I believe, two occasions that someone called and requested that they be permitted to speak to Mr. Bullock, particularly myself?

A. One time that I know of that they insisted to speak to him, yes.

Q. Pardon?

A. One time that I know myself that they insisted to speak to him.

Q. And that was me?

A. Yes, sir.

Q. Do you recall what you told me?

A. Yes, sir.

Q. What was that?

A. I didn't know you, I didn't know if he was your client; that he was being interrogated in the back room on the second floor.

Q. This is what you told me?

A. Yes, sir.

Q. Did you not tell me, Officer Rawls—see if this refreshes your memory—you said, "Herbert, you cannot talk to him because—"

(Soliloquy between Court and counsel.)

BY MR. REID:

Q. I believe you then stated that you would not allow me to talk to the accused?

A. That's correct.

RT 137, 138:

Q. If you recall, Officer Rawls, did Mr. Bullock tell you that he wanted to talk to me; that "I want to call Herb," or words to that effect?

A. I know he did say he wanted to talk to Mr. Reid, yes, sir.

Q. And was he given the privilege of talking to me?

A. He used the phone twice, sir.

Q. He used the phone twice, Mr. Rawls?

A. Yes, sir, twice while he was there he talked to someone.

Q. Was this prior or subsequent to the time that he asked if he could talk to me?

A. I could not tell you.

* * * *

On June 22, 1964, this Court held in *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. Ed. 2nd 977, 84 S. Ct. 1758, in a factual situation which is directly in point with the question herein raised:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but had begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the assistance of counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment", *Gideon* v. *Wainwright*, 372 U.S. 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that re-hearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

Respectfully submitted,

HERBERT S. REID, JR.

Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

HERBERT S. REID, JR.

Counsel for Petitioner